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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979.

NO. 79-1308

FRED BUTTERWORTH,
Superintendent, Massachusetts
Correctional Institution at Walpole,
Petitioner,

v.

WALTER J. LOVETT, JR.
Respondent.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the First Circuit.

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Petition for Writ of Certiorari
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Opinion Below.

The opinion of the court below (App. A) is not yet reported.

Jurisdiction.

The decision of the court below was rendered on December 13, 1979. The mandate was stayed until February 25, 1980, pending the application to this court for a writ of certiorari. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED.

I. Whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor secures an indictment for the same offense as charged by complaint in a district court, which under state law had no jurisdiction over that offense, after a defendant has claimed his right to a trial de novo?

STATEMENT OF THE CASE.

Respondent was originally charged in a complaint alleging that he "did break and enter in the nightime a dwelling house ...with the intent therein to commit a felony, to wit: larceny of goods of the value of more than one hundred dollars...in

violation of G.L. c. 266, §16..."[1/] After a non-jury trial, he was convicted and sentenced to two and one-half years in the House of Correction. Respondent then exercised his right to a trial de novo in the Superior Court.[2/] While the appeal was pending, a grand jury returned an indictment charging petitioner with the same offense which formed the substance of the original complaint, i.e., "breaking and entering in the night time a dwelling house with intent to commit a felony", in violation of Gen. ch. laws 266

1/Mass. Gen. Laws c. 266 S16 provides: Whoever, in the night time, breaks and enters a building, ship or vessel, with intent to commit a felony, shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one half years.

2/Massachusetts utilizes a two tier system of criminal courts. See Ludwig v. Massachusetts, 427 U.S. 618 (1976).

§15. The erroneous reference to §16 was omitted.[3/] The respondent moved to dismiss the indictment on the ground of former jeopardy. The motion was denied. After trial in the Superior Court before a jury he was found guilty and sentenced to a term of from ten to twenty years in Massachusetts Correctional Institution, Walpole. The judgment was affirmed on appeal. Commonwealth v. Lovett, Mass. Adv. Sh. (1978) 355, 372 N.E. 2d 782 (App. C).

3/Mass. Gen. Laws c. 266, S15 provides: Whoever breaks and enters a dwelling house in the night time, with the intent mentioned in the preceding section, or, having entered with such intent, breaks such dwelling house in the night time, the offender not being armed, nor arming himself in such house, with a dangerous weapon, nor making an assault upon a person lawfully therein, shall be punished by imprisonment in the state prison for not more than twenty years and, if he shall have been previously convicted of any crime named in this or the preceding section, for less than five years.

Respondent then filed a petition for writ of habeas corpus which was denied Lovett v. Butterworth, No. 78-1089-F (D. Mass. July 30, 1979). (App. B). On appeal the First Circuit Court of Appeals vacated the judgment of the district court and remanded the cause "with instructions that the writ of habeas corpus be granted", Lovett v. Butterworth, No. 79-1419 (1st Cir. December 13, 1979) (App. A).

The petitioner moved for stay of the mandate pending the filing of this petition for a writ of certiorari which motion was allowed.

ARGUMENT.

I. The Action of the Prosecutor in seeking a Corrected Indictment Did Not Violate the Defendant's Right to Due Process.

Introduction

Under the Massachusetts statutory system the district courts have jurisdiction only over felonies for which the maximum penalty is not more than five years imprisonment in the state prison and over those crimes specifically enumerated in G.L. c. 266, §§16, 17, 18, 19, 28 and 49. G.L. c. 218, §26. Gen. Laws c. 266, §15 (breaking and entering a dwelling house) is not a specifically designated offense and it carries a maximum sentence of "not more that twenty years". Within the context of respondents argument in the state court, that he had been subjected to double jeopardy, the Supreme Judicial Court ruled that no jeopardy had attached, because the district court had no jurisdiction over the offense (breaking and entering a dwelling house), Commonwealth v. Lovett, 372 NE. 2d 782, 785 (1978)

Moreover, the original complaint alleged "dwelling house". Under Massachusetts law it is the 'language in the body of the complaint which controls, not the statutory citation, Commonwealth v. Jarrett, 359 Mass. 491, 495-495 (1971). Thus, the Supreme Judicial Court concluded:

> "The fact that the complaint contained the phrase 'in vio[lation] of G.L. c. 266, §16' is not determinative, however, as to the offense alleged thereby. The text of the allegation determines the nature of the complaint. Commonwealth v. McClaine, 367 Mass. 559 (1975). Here the language in the body of the complaint alleges that the defendant committed unarmed burglary of a dwelling house in the nighttime with intent to commit a felony therein, an offense not within the scope of the District's Court's powers. G.L. c. 266 §15. Cf. G.L. c. 277, §79." Commonwealth v. Lovett, at 786.

It is basic that the ". . .state courts are the ultimate expositors of state law ...". Mullaney v. Wilbur, 421 U.S. 684, 691

(1974). It is therefore suggested that the Court of Appeals has far exceeded their authority by ignoring the determination of the state court that the district court had no jurisdiction and by dismissing the state courts' construction of the complaint and indictment as charging the same offense - an offense carrying the same range of penalties.

> ". . . .the prosecution here did not increase the severity of the charge in retailiatory response to the defendants exercise of his right to appeal. Instead, the government obtained an indictment for the same offense as that cherged in the complaint which was erroneously brought in the District Court. Commonwealth v. Lovett, at 786.

Viewing the situation under the state's construction of its own law, the respondent was indicted for the exact same offense as charged in the original complaint, an offense carrying with it the same range of

penalties as existed under the indictment when brought in a forum having jurisdiction of the offense.

A. The Court of Appeals Erred In Finding That A Prima Facie Case Of Prosecutorial Vindictiveness Had Been Established.

The Court of Appeals has extended the principles of Blackledge v. Perry, 417 U.S. 21 (1974) and North Carolina v. Pearce, 395 U.S. 711 (1969) from cases involving a substitution of greater or additional charges by the prosecution after a defendant claims a constitutional right to a situation in which a subsequent indictment charged the same offense, to wit: breaking and entering a dwelling house.

The cases relied upon by the Court below do not support such an extension. In United States v. Jamieson, 505 F. 2d 407

(D.C. Cir. 1974), cited in United States v. Preciado-Gomez, 529 F. 2d 935, 939 (9th Cir. 935, 939 (9th Cir. 1976), the defendants originally charged with second degree murder were, after a mistrial, reindicted for first degree. In United States v. Ruesga-Martinez, 534 F. 2d 1367 (9th Cir. 1976), when the defendant refused to waive trial before a magistrate the misdemeanor charge was raised to a felony charge. No such increase in charge is involved in the instant proceeding. Nor, were additional charges arising from the same conduct added on reindictment. Compare Jackson v. Walker, 585 F. 2d 139 (5th Cir. 1978). See also Miracle v. Estelle, 592 F. 2d 1269 (5th Cir. 1979), (after reversal of conviction obtained pursuant to an indictment carrying a potential 5-99 year punishment, the

prosecutor proceeded on an indictment carrying automatic life imprisonment). In the instant case the potential punishment was identical. Moreover, the final case relied upon by the Court of Appeals, United States v. Andrews, 444 F. Supp. 1238 (E.D. Mich. 1978), has been reversed. United States v. Andrews, No. 78-5166, decided December 14, 1979 (6th Cir. 1979). It is therefore suggested that the Court of Appeals has unjustifiably extended Blackledge v. Perry to a situation never contemplated by this or any other Court.

B. The Standard Imposed By The Court of Appeals Against Which Prosecutorial Conduct Is To Be Measured Is Not Required By The Decisions Of This Court And Is In Conflict With The Sixth Circuit.

Although the Court below did not explicitly state what standard it was applying, the inference to be drawn from the cases relied upon, the district court

decision in United States v. Andrews, supra, and Ruesga-Martinez, supra, is that the court adopted the proposition that the "appearance of vindictiveness" is the proper standard. It is submitted that this proposition is not consistent with this Court's decisions.

In Colton v. Kentucky, 407 U.S. 104 (1973), this Court observed that the increased sentence, there as here, was imposed by a different judge and therefore there was little possibility that "personal vindictiveness" was involved. That more than "the appearance of vindictiveness" is required is also apparant in this Court's reference to Blackledge and Pearce in Bordenkircher v. Hayes, 434 U.S. 357 (1978). Although Bordenkircher is clearly distinquishable on its facts from the instant case, this Court's restrictive

construction of Pearce and Blackledge is instructive:

> This Court held in North Carolina v. Pearce, 395 U.S. 711, 725, that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in situation there was also a "realistic likelihood of 'vindictiveness'". Blackledge v. Perry, 417 U.S., at 27. Bordenkircher at 362.
>
> .....
>
> The Court has emphasized that the due process violation in cases such as Pearce and Perry lay not in the possibility that a defendant might be deterred from the exercise of a legal right, see Colten v. Kentucky, 407 U.S. 104; Chaffin v. Synchcombe, 412 U.S. 17, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction. See Blackledge v. Perry, supra, at 26-28. Id., at 363.

It is submitted that under this Court's teachings it is not the "appearance of vindictiveness" but whether there is a "realistic likelihood" that the State might be "retaliating" or imposing a penalty on the accused for exercising his constitutional rights that is the proper standard. Here, the prosecutor charged the same offense which did not require that a greater penalty be imposed (compare Miracle v. Estelle, supra), but left open to the judge the same range of penalties available on the original complaint had it been brought in the proper forum.

The lower court's application of the "appearance of vindictivenes " standard is in conflict with that posited by the Sixth Circuit Court of Appeals in United States v. Andrews, supra. The instant case therefore presents the Court with the

opportunity to resolve a conflict between the Circuit Courts of Appeal.

C. Assuming A Prima Facie Case Of Vindictiveness Has Been Established, The Prosecution Has Presented A Reasonable Explanation Of The Action Taken Which Negates Any Inference Of Vindictiveness In Fact.

Again it is submitted that the Court below has held the prosecution to a stricter standard than is required by this Court and by the Second, Sixth and Eighth Circuits. Again relying upon the district court opinion in United States v. Andrews, 444, F. Supp. at 1240, 1243, the Court below held that mistake or inadvertant prosecutorial error could not negate the appearance of vindictiveness. However, both the Sixth Circuit in reversing the lower court decision in Andrews and the Second Circuit in United States v. Ricard, 563 F. 2d 45 (2nd Cir. 1977), have recognized that a increase in charges may

be justified if it is a reasonable step by the prosecution to correct a "mistake or oversight in the initial action". See also United States v. Partyka, 561 F. 2d 118 (8th Cir. 1977).

In the instant case, the prosecution in its discretion sought a new indictment correcting the erroneous citation to Section 16 and bringing the charge in the forum having jurisdiction of the §15 offense.[4/] It is suggested that this was a reasonable action on the part of the prosecutor and that it is the reasonableness of that action and not the defendants' reactions that should control. Hardwick v. Doolittle, 558 F. 2d 292, 302 (5th Cir. 1977).

4/No double jeopardy question is involved because the lower court had no jurisdiction of the offense charged. Diaz v. United States, 223 U.S. 442, 449 (1912); Lemieux v. Robbins, 414 F. 2d 353 (1st Cir. 1969).

It is suggested that the per se approach of the Court below which focuses solely upon the defendant's conduct subsequent to his initial sentence to justify a change in charges and precludes consideration of the occurrence of a mistake is not mandated by Blackledge and is inconsistent with decision of other Circuits.

CONCLUSION

For the reasons stated in the above petition the writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 79-1419

WALTER J. LOVETT, JR.,
PETITIONER, APPELLANT,
v.
FRED BUTTERWORTH, SUPERINTENDENT,
MASSACHUSETTS CORRECTIONAL INSTITUTION
AT WALPOLE,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge.*]

Before
CAMPBELL and BOWNES, *Circuit Judges,*
and BONSAL,* *Senior District Judge.*

Matthew H. Feinberg, by appointment of the Court, with whom *Kassler, Feinberg & Feuer* was on brief, for appellant.

Barbara A. H. Smith, Assistant Attorney General, Chief, Criminal Appellate Section, with whom *Francis X. Bellotti,* Attorney General, and *Stephen R. Delinsky,* Assistant Attorney General, Chief, Criminal Bureau, were on brief, for appellee.

December 13, 1979

BONSAL, *District Judge.* Walter J. Lovett, Jr. appeals from the denial by the district court of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He currently is serving a ten-to-twenty-year sentence in the Massachusetts penitentiary at Walpole. His appeal presents questions of importance regarding the scope of the due process clause of the fourteenth amendment.[1]

* Of the Southern District of New York, sitting by designation.

I

On June 17, 1975, a complaint was filed in the Second District Court of East Worcester charging petitioner with the crime of "break[ing] and enter[ing] in the nighttime a dwelling house . . . with intent therein to commit a felony . . . in violation of G.L. c. 266 § 16 . . . ."[2] Under Massachusetts law, jurisdiction over crimes charged under section 16 is lodged concurrently in the superior courts and the district courts.[3] Following a non-jury trial before the district court, petitioner was found guilty as charged. He was sentenced to two and one-half years to be served in the Worcester House of Corrections. Petitioner then exercised his right to appeal for a trial *de novo* in the Worcester County Superior Court.[4] Mass. Gen. Laws, ch. 278, § 18.

[1] Petitioner also urges a violation of his right under the fifth amendment to protection against double jeopardy. We find it unnecessary to reach this claim.

[2] Mass. Gen. Laws, ch. 266, § 16, provides:

> Whoever, in the night time, breaks and enters a building, ship or vessel, with intent to commit a felony, shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one half years.

[3] The two-tier system of criminal courts has been utilized in Massachusetts since the Colonial Period. The first level consists of the district courts and the Municipal Court of the City of Boston. Mass. Gen. Laws, ch. 218, §§ 1, 50. The district courts exercise original jurisdiction over all felonies carrying a maximum sentence of five years, certain other felonies carrying higher sentences, all violations of municipal ordinances, and all misdemeanors except those involving criminal libel. *Id.* §§ 16-19, 26, 28, 49. All other crimes must be prosecuted in the superior courts. *See Ludwig* v. *Massachusetts,* 427 U.S. 618, 620 (1976).

[4] Had petitioner *pleaded* guilty in the district court, he would not have been entitled to a trial *de novo* in the superior court, but could only have appealed his sentence. Mass. Gen. Laws, ch. 278, § 18; *Morrissey* v. *Powell,* 304 Mass. 268, 269, 23 N.E.2d 411, 413 (1939). *See Commonwealth* v. *Crapo,* 212 Mass. 209, 210, 98 N.E. 702, 703 (1912).

While the appeal was pending, the Commonwealth obtained a grand jury indictment on the identical facts charging petitioner with the crime of "breaking and entering in the nighttime a dwelling house with intent to commit a felony" in violation of Mass. Gen. Laws, ch. 266, § 15.[5] The superior courts have exclusive jurisdiction over section 15 offenses. *See id.* ch. 218, § 26.

Petitioner's motion to dismiss the section 15 indictment was denied. He was convicted by a jury and sentenced to ten-to-twenty-years' imprisonment. On the Commonwealth's motion, the complaint upon which petitioner had been convicted in the district court was dismissed.

Petitioner's conviction and sentence were affirmed by the Massachusetts Supreme Judicial Court. *Commonwealth* v. *Lovett,* — Mass. —, —, 372 N.E.2d 782, 788 (1978).

Having exhausted his state remedies, petitioner filed a habeas corpus petition in the United States District Court for Massachusetts. Following a hearing, his petition was denied. No. 78-1809-F (D.Mass. July 30, 1979). While denying petitioner's motion for bail pending appeal, we authorized an expedited briefing schedule and argument. Order of August 27, 1979. We now reverse the district court.

II

In *Blackledge* v. *Perry,* 417 U.S. 21, 28 (1974), the Supreme Court held: "A person convicted of an offense is

The Massachusetts system differs from similar systems in other states that afford defendants a jury trial at the first level. *See Colten* v. *Kentucky,* 407 U.S. 104, 112 n.4 (1972).

[5] Mass. Gen. Laws, ch. 266, § 15, provides:

> Whoever breaks and enters a dwelling house in the night time, with the intent mentioned in the preceding section, or, having entered with such intent, breaks such dwelling house in the night time, the offender not being armed, not arming himself in such house, with a dangerous weapon, nor making an assault upon a person lawfully therein, shall be punished by imprisonment in the state prison for not more than twenty years and, if he shall have been previously convicted of any crime named in this or the preceding section, for not less than five years.

entitled to pursue his statutory right to a trial *de novo* without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." The *Blackledge* Court specifically based its decision upon *North Carolina* v. *Pearce,* 395 U.S. 711, 723-26 (1969), and its progeny, which hold that an increased sentence upon retrial *for the same charges* will trigger a due process examination.[6]

The fact that the petitioner here technically may not have been indicted on a "more serious charge" is of little constitutional significance since due process principles apply to enhanced sentences as well as enhanced charges. *United States* v. *Mallah,* 503 F.2d 971, 987 (2d Cir. 1974). "Due Process not only proscribes vindictive indictments, it also protects against vindictive prosecutions." *Miracle* v. *Estelle,* 592 F.2d 1269, 1274 (5th Cir. 1979). It is the prosecutor's attempt "to retry the appellant, seeking a heavier penalty *for the same acts* as originally charged, [that] is inherently suspect . . . ." *United States* v. *Preciado-Gomez,* 529 F.2d 935, 939 (9th Cir. 1976) (emphasis in the original).[7]

The present appeal involves an increased sentence resulting from what may well have been the vindictive action of the prosecutor. It therefore differs from the more typical situation where the increased penalty is meted out directly and solely by the sentencing judge. Since *Pearce*

[6] In *Pearce,* the defendant was convicted and sentenced to a prison term, which conviction was later set aside in a habeas corpus proceeding. On retrial, the defendant was again convicted, but the new sentence amounted to a longer total period of incarceration than that originally imposed. 395 U.S. at 713.

[7] This was recognized by Mr. Justice Rehnquist, the lone *Blackledge* dissenter, who concluded contrary to the majority that any due process violation stemmed *solely* from the imposition of the longer sentence, rather than additionally from the indictment on a more serious charge. 417 U.S. at 37.

requires us to review harsher sentences resulting from the decisions of sentencing judges, it follows that we must review harsher sentences resulting from the actions of the prosecutor, the defendant's natural adversary whose job it is to obtain convictions. This is especially so since policies favoring judicial discretion and flexibility in sentencing, *see Colton* v. *Kentucky*, 407 U.S. 104, 112-19 (1972), do not apply to the prosecutor.[8] "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978). Where, as "in the situation here the central figure is not the judge or jury, but the prosecutor . . . due process of law requires a rule analogous to that of the *Pearce* case." *Blackledge* v. *Perry*, 417 U.S. at 27. Thus we hold that the question whether a due process analysis must be employed at a trial *de novo* is to be determined not by the language of the indictment prepared by the prosecution, but by the potential for increased punishment[9] resulting from the actions of the

[8] The Commonwealth suggests that *Colton* is authority for its contention that increased sentences imposed at the *de novo* level can never engender a violation of due process. This mischaracterizes the factual basis for *Colton*, which involved a trial *de novo* on an original complaint. 407 U.S. at 108. *See also Chaffin* v. *Stynchcombe*, 412 U.S. 17, 26 (1973). Here, in contrast, the source of the enhanced sentence was the harsher range of penalties made available to the *de novo* judge by the *prosecutorial* decision to indict. "The tremendous harm to both the individual and society which would attend a prosecutor's abuse of his discretionary authority compels us to caution that an indictment motivated by vindictiveness or retaliatory purpose on the part of the prosecution will not withstand judicial scrutiny." *United States* v. *Stacey*, 571 F.2d 440, 444 (8th Cir. 1978).

[9] Such punishment, in addition to the sentence, may include various collateral consequences. *Blackledge* v. *Perry*, 417 U.S. at 28 n.6, *citing* Comment, *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929, 955-60 (1970).

prosecution. *Cf. United States* v. *Jamison*, 505 F.2d 407, 415 (D.C. Cir. 1974); *United States* v. *Ruesca-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976); *United States v. Andrews*, 444 F. Supp. 1238, 1240-41 (E.D. Mich. 1978).

III

Having determined that the rule against prosecutorial vindictiveness governs this appeal, we now consider whether due process has been denied to petitioner. It is settled law that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'" *Blackledge* v. *Perry*, 417 U.S. at 27.

Petitioner contends that he has been denied due process by reason of prosecutorial vindictiveness. In *Marano* v. *United States*, 374 F.2d 583, 585 (1st Cir. 1967), Judge Aldrich, anticipating the arrival of *Pearce* and *Blackledge*, held that "a defendant's right of appeal must be unfettered . . . . [A defendant] likewise should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a penalty for so doing." In similar fashion, the Supreme Court in *Pearce* emphasized that a prosecutor is "without right to . . . put a price on appeal. A defendant's exercise of a right of appeal must be free and unfettered . . . . [S]ince the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 724, 725.

In *Blackledge*, the Court held that retaliatory motivation can apply as well to the prosecutor as to the judge. The Court flatly stated that every prosecutor "has a considerable stake" in discouraging appeals since each appeal expends scarce prosecutorial resources. Thus, "if the

prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante,' " in this case by indicting the defendant in the hope of gaining an increased sentence, "the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial." 417 U.S. at 27-28.

The thrust of the decisions in *Pearce* and *Blackledge* is to safeguard the freedom of defendants to exercise their right of appeal. "The prophylactic rule is designed not only to relieve the defendant who has asserted his right from bearing the burden [of the prosecutor's] 'upping the ante' but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future." *United States* v. *DeMarco,* 550 F.2d 1224, 1227 (9th Cir. 1977). Other defendants in the shoes of the petitioner must choose between forfeiting their right to a trial *de novo* in order to assure that their sentence will not be increased or claiming their right of appeal with the accompanying risk. We thus conclude that petitioner has a significant due process interest since we are "dealing with the State's unilateral imposition of a penalty upon a defendant who [has] chosen to exercise a legal right to attack his original conviction . . . ." *Bordenkircher* v. *Hayes,* 434 U.S. at 362.

The Commonwealth contends that since it was error to prosecute petitioner under section 15 in the district court, its course of action is immunized from due process attack. The Commonwealth's argument was rejected by a unanimous panel of the Ninth Circuit in *United States* v. *DeMarco.* There, as here, "[t]he Government argue[d] that Blackledge [did] not control because . . . [the] second indictments grew out of *limits placed on the original indictment* . . . rather than any vindictiveness against the defendant." 550 F.2d at 1226 (emphasis provided). The court indicated that the prosecution had misread *Blackledge,*

holding that where "[t]he factual nucleus of both indictments [is] the same . . . the progenitor of *Blackledge* . . . *North Carolina* v. *Pearce* . . . forb[ids] increasing a sentence upon retrial after the defendant has successfully appealed, absent new facts unrelated to the appeal, affecting sentence." *Id.* at 1226, 1227.[10]

Petitioner should not now be penalized for any error of the Commonwealth in its fashioning of the original charge. "[I]t is the apprehension that there may be retaliatory action, not the procedural state of facts, which implicates due process rights . . . . That the government failed to [bring the grand jury indictment] prior to defendant['s] assertion of the right to [trial *de novo*] because of . . . [a] mistake . . . does not alter the fact that the charge 'appears vindictive.' " *United States* v. *Andrews,* 444 F.Supp. at 1240, 1243. That the prosecutorial error was

[10] In *Pearce,* the Supreme Court undertook an exhaustive analysis of the circumstances in which a sentence might be increased on retrial, concluding that "a more severe sentence . . . must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726. Proof of "[s]uch conduct affords evidence that the first sentence was not sufficient to serve its purpose of deterrence," *United States* v. *Coke,* 404 F.2d 836, 845 (2d Cir. 1968) (Friendly, J.), thus assuring that a defendant does not find "his sentence increased as a purely collateral consequence of seeking to raise something else." *Marano* v. *United States,* 374 F.2d 583, 585 n.2 (1st Cir. 1967). Establishment of such conduct, such as intervening criminal activity, would demonstrate that an increased sentence has not resulted from the actions of a vindictive prosecutor but, rather, in large measure has been self-imposed.

In *Ludwig* v. *Massachusetts,* 427 U.S. at 631, the Supreme Court concluded that "[a] defendant who elects to be tried *de novo* in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial." In like manner, the Commonwealth may proceed no further in prosecuting petitioner than it might a successful appellant for whom a retrial has been ordered.

inadvertent "is, of course, no acceptable excuse whatsoever." *United States* v. *Ruesca-Martinez,* 534 F.2d at 1370.

In *Miracle* v. *Estelle,* 592 F.2d at 1273, 1276, the Fifth Circuit noted: "As in *Blackledge,* both prosecutions were directed at the same criminal act . . . . Missing from the prosecution . . . is a new decision or act of discretion by the state attorney to initiate charges against [petitioner] for distinct criminal acts." Here too the Commonwealth's legitimate interest in bringing a new prosecution for the same crime is very slight since the indictment involves the same criminal act as the complaint. The dismissal of the indictment here "entails only a minor infringement on the exercise of prosecutorial discretion." *Jackson* v. *Walker,* 585 F.2d 139, 144 (5th Cir. 1978). And even if it were more substantial, the Commonwealth's interest would not rise to the requisite *Pearce* level of a showing that the prosecution exercised its discretion because of conduct on the part of petitioner subsequent to his initial sentence.

IV

We thus have before us a significant due process interest to weigh against a minor or nonexistent prosecutorial interest. Therefore, apprehension of vindictiveness by the Commonwealth in the form of an indictment is sufficient to contravene due process. Compare *Commonwealth* v. *Lovett,* ___ Mass. at ___, 372 N.E.2d at 786.

The Court in *Blackledge* specifically conceded that there was "of course, no evidence that the prosecutor in this case acted in bad faith or maliciously," and indicated that its earlier holding in *Pearce* "was not grounded on the proposition that actual retaliatory motivation must inevitably exist." 417 U.S. at 28. "In effect, *Blackledge* sets up a per se rule . . . that in some situations a due process violation can be established by a showing that defendants might have a reasonable apprehension of prosecutorial vindictiveness, without a showing that the prosecutor actually had a vindictive or retaliatory motive to deter appeals." *Jackson* v. *Walker,* 585 F.2d at 143.[11] "The semblance of vindictiveness that arises from the imposition of a harsher sentence the second time around must be obviated so that the proceedings do not leave the impression of unfairness to the defendant . . . and so that other defendants are not deterred from exercising rights of appeal due to apprehension of vindictiveness." *United States* v. *Tucker,* 581 F.2d 602, 605 (7th Cir. 1978). Otherwise the situation is too suggestive of the possibility of vindictive motive. "Due process of law requires that such a potential for vindictiveness not enter into [Massachusetts'] two-tiered appellate process." *Blackledge* v. *Perry,* 417 U.S. at 28.

The judgment is vacated and the cause remanded with instructions that the writ of habeas corpus be granted.

It is so ordered.

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[11] The *Jackson* court went on to note that there were "at least two reasons for such a per se rule. First, it is difficult to prove in court the actual state of mind of a prosecutor during his exercise of discretion. And second, reindictments that look vindictive, even though they are not, may still make future defendants so apprehensive about the vindictiveness of prosecutors that they will be deterred from appealing their convictions." 585 F.2d at 143.

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APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WALTER J. LOVETT, JR., Petitioner)

v.

FRED BUTTERWORTH, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT WALPOLE, Respondent)

CR NO 78-1809-F

OPINION

July 30, 1979

FREEDMAN, D.J.

Walter J. Lovett, Jr. was convicted, by way of a jury verdict, in Worcester County Superior Court, of the crime of breaking and entering a dwelling house in the nighttime with intent to commit a felony, in March 1976. He was sentenced to a term of imprisonment of ten to twenty years.

The matter before this Court is Lovett's petition, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus. Lovett, who is currently incarcerated at M.C.I. Walpole, attacks the validity of the superior court judgment on constitutional grounds. Specifically, petitioner asserts that the conviction violated both due process and the protection against twice being placed in jeopardy for the same offense. Additionally, Lovett argues that a juror on the panel exhibited bias and, that the trial court erred when it denied his motion to dismiss the indictment against him and his motion for a directed verdict.

As a preliminary matter, the Court finds that Lovett has indeed exhausted the available state remedies, see 28 U.S.C. § 2254(b). The constitutional claims presented to this Court in the petition are the same as, or are substantially equivalent to those asserted in the motion to dismiss as well as in the appeal to the Supreme Judicial Court from that motion's denial and petitioner's subsequent conviction.

The parties have agreed that there is no need for an evidentiary hearing on this petition. Since the relevant facts here are capable of "reconstruction from the record," Lemire v. McCarthy, 570 F.2d 17, 19 (1st Cir. 1978), which includes the entire transcript of petitioner's trial and a copy of the decision of the Supreme Judicial Court affirming the conviction, an evidentiary hearing is not required in this case. The facts are not in dispute.

On June 17, 1975 a criminal complaint issued from the Second District Court of Eastern Worcester charging that Lovett "did break and enter in the nighttime the dwelling house of Dr. Joseph E.D. Humphries...with intent therein to commit a felony, to wit: larceny [of] goods of the value of more than one hundred dollars...in violation of G.L.C. 266, S. 16..." (emphasis supplied).[1] On July 9, 1975, after a non-jury trial, petitioner was convicted of the offense charged and sentenced to two and one half years in the house of corrections.

Exercising his right to a trial de novo in the superior court, petitioner appealed the district court conviction pursuant to M.G.L. c. 278, § 18, as amended by St.

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[1] M.G.L. c. 266, § 16, the statute cited in the complaint, reads in pertinent part: "Whoever, in the nighttime, breaks and enters a building, ship or vessel, with intent to commit a felony, shall be punished by imprisonment in...a jail or house of corrections for not more than two and one half years." (emphasis supplied). However, it is the previous section of this Chapter whose language was tracked in the complaint: "Whoever breaks and enters a dwelling house in the nighttime with the intent [to commit a felony]...shall be punished by imprisonment in the state prison for not more than twenty years...." M.G.L. c. 266, §15 (emphasis supplied).

It is beyond dispute that while the district courts of the Commonwealth have power to hear actions brought under section 16, the superior court has exclusive jurisdiction to try defendants indicted for violating section 15, see M.G.L. c. 218, § 26, as amended by St. 1973, c. 585.

1974, c. 167.[2] He was released on personal recognizance.

While the appeal was still pending, the district attorney, apparently recognizing for the first time the disparity between the substance of the offense charged in the complaint and the statute cited and, realizing that although the offense was within the exclusive jurisdiction of the superior court, the statute nevertheless cited a violation specifically included in the district court sphere, see M.G.L. c. 218, § 26, as amended by St. 1973, c. 585,[3] sought and obtained an indictment from the grand jury. The indictment, which charged petitioner with the same criminal activity that was the subject of the criminal complaint, to wit: "breaking and entering in the nighttime a dwelling house with intent to commit a felony," this time correctly cited M.G.L. c. 266, § 15[4] as the basis for the violation.

Petitioner was convicted of the offense charged after a four-day jury trial in Worcester County Superior Court ending on March 26, 1976. He received a sentence of ten to twenty years incarceration to be served at M.C.I. Walpole. At that point, on the Commonwealth's motion, the appeal to the Superior Court for a trial de novo was dismissed. During the trial,

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[2] M.G.L. c. 278 § 18, as amended, provides in part: "Notwithstanding any other provision of law, a defendant after a finding of guilty, jury-waived, in a district court...may appeal therefrom and shall thereafter be entitled to a trial de novo in a jury-of-six session in accordance with...section twenty seven A."

[3] M.G.L. c. 218 § 26, as amended provides in part: "District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses...:...all felonies punishable by imprisonment in the state prison for not more than five years, [and] the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six...." (emphasis supplied).
It is clear that actions in violation of section 15, were not specifically added to the district court's jurisdiction. Furthermore, the offense does not come under the general maximum sentence provision because section 15 carries a maximum sentence of "not more than twenty years."

[4] see, n. 1 supra.

petitioner had moved to dismiss the indictment and for a directed verdict; both motions were denied.

Lovett appealed the conviction pursuant to M.G.L. c. 278, §§ 33A-33G. The Appeals Court stayed execution of the prison sentence pending determination of the questions raised on appeal. On April 4, 1977, the Supreme Judicial Court, on its own initiative, ordered the matter transferred before it for direct appellate review. The conviction was affirmed on February 16, 1978. The present petition was filed in this Court on July 18, 1978.

Due Process Claim

Petitioner claims that the indictment by the grand jury, coming after he was tried and convicted in the district court, contravened the due process clause of the Fourteenth Amendment. He cites Blackledge v. Perry, 417 U.S. 21 (1974), as the basis for the argument.

In Blackledge, the defendant Perry, while incarcerated in a North Carolina penitentiary, was involved in a fracas with a fellow inmate. As a result of the altercation, a warrant issued charging Perry with assault and battery with a deadly weapon, a misdemeanor under the North Carolina penal code. After a non-jury trial in the district court,[5] Perry was convicted and sentenced to six months imprisonment "on and after" the time he was then serving.

A seasonable appeal was filed claiming the defendant's right to a trial de novo in superior court.[6] While the appeal

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[5] The district courts in North Carolina had exclusive jurisdiction over the misdemeanor Perry was charged with. See N.C. Gen. Stat., § 7A-272.

[6] Petitioner has asserted, and this Court takes judicial notice of the fact, that the statutory schemes by virtue of which a defendant convicted of a crime in a jury-waived trial in a district court can claim a trial de novo in superior court in Massachusetts and in North Carolina are substantially similar, if not identical.

was pending, the prosecution obtained a true bill from the grand jury on an indictment charging Perry with assault and battery with a deadly weapon with intent to kill and inflict serious bodily injury, a felony. The indictment stemmed from the same incident that had previously resulted in the district court trial. Perry entered a plea of guilty to the charge in superior court and was given a concurrent sentence of five to seven years incarceration.

Subsequently, the United States District Court granted Perry's petition for a writ of habeas corpus, finding that the indictment and superior court proceedings had violated double jeopardy and due process. The Fourth Circuit Court of Appeals affirmed and the Supreme Court granted certiorari. 414 U.S. 908 (1973).

Determining that, indeed, the state court procedure had violated the defendant's due process rights in that "it was not constitutionally permissable for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo," 417 U.S. at 29 (emphasis supplied), the Supreme Court affirmed the judgment.[7]

Lovett, asserting that Blackledge is "eerily similar to this matter,"[8] argues that his petition should be similarly granted. The supreme Judicial Court, however, distinguished this fact situation from that existing in Perry's petition, opining that "[b]y contrast, the prosecution here did not increase the severity of the charge in retaliatory response to the defendant's exercise of his right to appeal. Instead, the government obtained an indictment for the same offense as that

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[7]The Court did not reach Perry's double jeopardy claim, 417 U.S. at 25. The judgment was affirmed on the basis of the due process violation.

[8]"Petitioner's Memorandum in Support of His Application For a Writ of Habeas Corpus," at p. 4.

charged in the complaint which was erroneously brought in the District Court." Commonwealth v. Lovett, 1978 Mass. Adv. Sh. 355, 361. I agree that petitioner's reliance on Blackledge is misplaced in that his petition can be distinguished on its facts.

In Blackledge, the Supreme Court considered the potential for "prosecutorial vindictiveness" in states maintaining a two-tiered criminal justice system, similar to those existing in North Carolina and Massachusetts, which could result in a defendant being penalized for asserting a statutory right to a trial de novo in superior court after a conviction in the district court. Allowing a situation to exist whereby the prosecution could charge a more serious offense during the hiatus between the filing of an appeal and the trial de novo, the Court reasoned, could operate as a chilling effect upon the defendant's right to appeal; thus, a due process violation.

> [T]he Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness".... [H]ere the central figure is ... the prosecutor....
>
> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court.... And, if the prosecutor has the means readily at hand to discourage such appeals--by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy--the State can insure that only the most hardy defendancs will brave the hazards of a de novo trial.
>
> ...A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Blackledge, supra at 27-8.

The similarities between Perry's petition in Blackledge

and the one before this Court are, as Lovett suggests, similar in many respects: both Perry and Lovett had criminal complaints issued against them; both were tried and convicted in the district court of the offense charged; both exercised their statutory right of appeal to the superior court for a trial de novo; both had indictments returned against them before receiving the de novo trial and, finally, both were convicted in superior court of the crimes charged in the indictments and received longer periods of incarceration than they had been sentenced to at the district court level. Nevertheless, the Lovett petition presents a different factual situation than did Perry's in one fundamental respect; Lovett was not charged with a more serious offense in the indictment. The complaint and the indictment expressed in identical terms that he was accused of breaking and entering in the nighttime a dwelling house with intent therein to commit a felony.

Petitioner's contention that he was actually charged with the lesser offense of breaking and entering a building, ship or vessel because the statute cited was M.G.L. c. 266, § 16 is not persuasive. It is well-settled in Massachusetts that "it is the substance of the complaint that governs, and that is determined by the language in the body of the complaint itself." Commonwealth v. McClaine, 367 Mass. 559, 560 (1975), citing Commonwealth v. Brown, 116 Mass. 339, 340 (1874) and Commonwealth v. Jarrett, 359 Mass. 491, 495-6 (1971). The language in the body of the complaint in question clearly describes a violation of § 15.

It is conceivable, probably even likely, that had petitioner not elected to appeal to the superior court, the error would have remained undetected and he would have had to serve only the house of corrections sentence. However, the

fact that the appeal may have "flagged" the mistake and exposed him to a greater period of incarceration does not, absent a realistic likelihood of prosecutorial vindictiveness, give rise to a Blackledge-type violation of petitioner's due process rights. See Blackledge, supra at 27. There is no such likelihood present in this case.

This situation, in which the petitioner received a greater sentence upon retrial because his election to appeal both alerted the Commonwealth to the district court's lack of jurisdiction and enabled it to obtain an indictment charging him with the same offense but in the proper forum, does not create the type of atmosphere that would engender the possibility of prosecutorial vindictiveness that the Court in Blackledge sought to prevent.

Double Jeopardy Claim

In addition to the due process argument, petitioner has asserted that the superior court trial and conviction were violative of the double jeopardy clause of the Fifth Amendment, made applicable to the Commonwealth by Benton v. Maryland, 395 U.S. 784 (1969). He proffers the Supreme Court's decision in Waller v. Florida, 397 U.S. 387 (1970) as the dispositive case on this issue.

In Waller, the defendant had been charged with destruction of city property and disorderly breach of the peace in connection with the removal of a mural from City Hall in St. Petersburg, Florida. He was tried and convicted of the offense in municipal court and received a sentence of 180 days in a county jail. Soon thereafter, Waller had an information filed against him in state court which, though arising out of the same incident, charged him with grand larceny. His attempts to prevent the second trial on double jeopardy grounds fell on deaf ears. He was tried and convicted in state court of the

greater offense and was sentenced to five years incarceration, less the time he had already served pursuant to the municipal court judgment. The District Court of Appeal, holding that "even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court," Waller v. State, 213 So. 2d 623, 624 (1968), affirmed. Waller's petition for a writ of certiorari to the state supreme court was denied. 221 So. 2d 749 (1968).

The Supreme Court, when considering Waller's double jeopardy claim, noted that it had before it "the asserted power of the two courts within one state to place petitioner on trial for the same alleged crime." Waller v. Florida, supra at 390. The state justified the two trials on the basis of its dual court system in which each was considered a sovereign. The Court, however, did not accept the dual sovereign theory and ordered that the second judgment be vacated, as it violated the double jeopardy clause.

The case at bar is distinguishable from Waller on its facts. Massachusetts does not maintain the municipal-state dual court system that Florida employed at the time Waller was reported. Furthermore, there is no claim on the part of the Commonwealth that it would have been justified in trying Lovett in superior court, absent a c. 278, § 18 appeal, had the district court been granted jurisdiction over § 15 offenses.

The issue here is whether jeopardy attached at the district court level despite the fact that the court had no statutory authorization to try petitioner for the crime charged, breaking and entering, in the nighttime, a dwelling house with intent to commit a felony. This issue is fundamentally dissimilar from that in Waller where there was no

question but that both the municipal court and the state court had jurisdiction to try the defendant.[9] For these reasons then, I find petitioner's reliance upon Waller to be misplaced.

The Supreme Judicial Court takes the position that since the district court did not have the power to try the petitioner on a § 15 offense, no binding judgment could enter and, therefore, no jeopardy attached at that level. Commonwealth v. Lovett, supra at 358, citing Commonwealth v. Roby, 12 Pick. 496, 502 (1832), Diaz v. United States, 223 U.S. 442, 449 (1912).

The First Circuit adopted this Diaz rationale in Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), cert. denied, 397 U.S. 1017 (1970), where it held that because the district court in Maine only had jurisdiction to try the defendant for simple assault, a misdemeanor, no jeopardy had attached in that court that would preclude defendant's superior court trial on the more serious felony charge of aggravated assault, even though both prosecutions stemmed from the same incident.

Petitioner argues that Diaz and its progeny have been discredited in the aftermath of Waller. For reasons stated above, the Court is not persuaded that Waller is controlling on the double jeopardy issue presented by this petition. Accordingly, I find that Lemieux remains good law in this Circuit and, I concur with the Supreme Judicial Court's determination that because no jeopardy attached in the district court, the superior court trial was not violative of the Double Jeopardy Clause of the Fifth Amendment.

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[9] Petitioner has cited Culberson v. Wainwright, 453 F.2d 1219 (5th Cir. 1972), cert. denied, 407 U.S. 913 (1972) for the proposition that Waller held that regardless of jurisdictional issues, a state cannot try a defendant twice for crimes arising out of the same set of circumstances. In fact, Waller was not a jurisdiction case. It was rather a dual sovereignty case. See Robinson v. Neil, 366 F. Supp. 924, 928 (S.D. Tenn. 1973)(a case petitioner also cited).

Other Claims

Although the issue has not been addressed by either petitioner or respondent in their memoranda, there is a claim in the petition that a juror talked to one of the Commonwealth's witnesses during a recess in the superior court trial.

The record shows that, in response to questioning by the court, Officer Charles Waite, a prosecution witness, revealed that he had been spoken to by a woman during a break in the trial. Waite was not certain that the woman was a juror although he assumed that she was. He reported that she had said something to the effect "you've got good composure." The record also reflects that while petitioner's counsel did ask that the juror be removed, and took exception to the court's refusal to do so, he did not request a voir dire on the subject, nor did he move for a mistrial. Tr. 327-30.

Assuming arguendo, that the unidentified declarant was a juror, this Court nevertheless finds that the statement made was of such an innocuous nature it could not be deemed prejudicial to petitioner. Therefore, the brief remark did not render the trial constitutionally infirm.

Finally, petitioner contends that the trial court erred in denying his motion for a directed verdict. Again, the argument has not been briefed by the parties and, there seems to be a serious question regarding exhaustion. However, this Court has read the entire superior court record with the assumption that petitioner has raised an insufficiency of evidence claim. From that reading of the record, it appears clear that there was indeed, sufficient evidence of petitioner's culpability to justify a rational trier of fact to find him guilty of the offense charged beyond a reasonable doubt. See Jackson v. Virginia, No. 78-5283, Slip. op. (Sup. Ct., June 28, 1979.

Conclusion

Accordingly, for all the reasons set forth above, this Court finds that the petition of Walter J. Lovett, Jr. for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, should be denied. An appropriate order shall enter.

Frank H. Freedman
United States District Judge

APPENDIX C

COMMONWEALTH

v.

Walter J. LOVETT, Jr.

Supreme Judicial Court of Massachusetts, Worcester.

Argued Oct. 3, 1977.

Decided Feb. 16, 1978.

Defendant was convicted after trial in the Superior Court, Beaudreau, J., of breaking and entering a dwelling house in the nighttime with intent to commit felony. After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review. The Supreme Judicial Court, Liacos, J., held that: (1) the district court had no jurisdiction over the offense, and thus double jeopardy principles did not bar superior court proceedings on an indictment charging defendant with it; (2) district court did not have jurisdiction of the offense merely because the complaint referred to defendant as having violated the statute proscribing, inter alia, nighttime breaking and entering of a building, etc., which was an offense specifically included within the district court's jurisdiction, but rather the text of allegations determined the nature of the complaint, and where the body of the complaint alleged that defendant committed unarmed burglary of a dwelling house in the nighttime with intent to commit a felony therein, the district court had no jurisdiction, and (3) the judge's inquiry of a witness was sufficient to determine the nature of an incident assertedly involving a juror and to conclude that no prejudice occurred, and the judge was not required to conduct a hearing.

Judgment affirmed.

served that the required knowledge is as to the nature of the contents, and not that the matter was "legally obscene."

1. Criminal Law ⇐187

Double jeopardy prohibition clearly applies to retrial after conviction as well as after acquittal, but double jeopardy principles do not always prohibit second trials.

2. Criminal Law ⇐295

Defendant who claims to have been twice put in jeopardy by trial must show that he or she had been placed in jeopardy at earlier trial for same offense.

3. Criminal Law ⇐167

Jeopardy does not attach if earlier proceedings were conducted by court without jurisdiction over offense.

4. Criminal Law ⇐167

District court had no jurisdiction over offense of breaking and entering a dwelling house in nighttime with intent to commit felony, and thus double jeopardy principles did not bar superior court proceedings on indictment charging defendant with commission of same offense. M.G.L.A. c. 218 § 26; c. 266 §§ 15, 16; c. 278 § 18.

5. Criminal Law ⇐93

District court did not have jurisdiction of offense merely because complaint referred to defendant as having violated statute proscribing, inter alia, nighttime breaking and entering of building, etc., which was an offense specifically included within district court's jurisdiction; text of allegation determined nature of complaint, and where body of complaint alleged that defendant committed unarmed burglary of dwelling house in nighttime with intent to commit felony therein, district court had no jurisdiction. M.G.L.A. c. 218 § 26; c. 266 §§ 15, 16, 18; c. 277 § 79.

6. Criminal Law ⇐187

That greater sentence was imposed in superior court than in district court, which had no jurisdiction of offense, did not establish double jeopardy.

7. Criminal Law ⇐853(8)

Improper private communications between jurors and witnesses are fundamentally inconsistent with concepts of due process and fair trial, and government had burden of proving that asserted communication with juror did not prejudice defendant.

8. Criminal Law ⇐868

In view of fact that it could not be said with certainty even that woman who congratulated officer on his composure as a witness was a juror, judge's inquiry of officer was sufficient to determine nature of incident and conclude that no prejudice occurred, and judge was not required to conduct hearing at which juror would be questioned as to possible prejudice, in view of fact that defense counsel did not request voir dire of jury or other investigatory action; in any event, nature of woman's comment did not indicate that she could not give defendant fair trial.

9. Criminal Law ⇐1044.2(1)

Where motion for directed verdict was limited to so much of indictment as alleged nighttime breaking, defendant could not for first time on appeal contend that evidence was insufficient to establish that it was he who broke and entered premises. M.G.L.A. c. 266 §§ 15, 18.

10. Criminal Law ⇐1178

Contention not argued on appeal brought nothing before Supreme Judicial Court for review. S.J.C. Rule 1:13.

John C. McBride, Everett, for defendant.

Daniel F. Toomey, Asst. Dist. Atty., for Commonwealth.

Before HENNESSEY, C. J., and QUIRICO, KAPLAN, LIACOS and ABRAMS, JJ.

LIACOS, Justice.

On June 17, 1975, a criminal complaint was lodged against the defendant in the Second District Court of Eastern Worcester charging the offense of breaking and entering a dwelling house of one Dr. Joseph Humphries in the nighttime with intent to commit the felony of larceny of goods val-

ued at more than $100.[1] The complaint erroneously noted that this conduct constituted a violation of G.L. c. 266, § 16.[2]

On July 9, 1975, the defendant was convicted on the complaint and sentenced to a term of two and one-half years in a house of correction. Pursuant to G.L. c. 278, § 18, as amended through St.1974, c. 167, he appealed for a trial de novo and was released on personal recognizance.

On September 30, a grand jury indicted the defendant for the same offense as that charged in the complaint, the nighttime breaking and entering of the dwelling house of Dr. Humphries with intent to commit the larceny of goods worth more than $100. After a four-day trial in the Superior Court in Worcester County, a jury found the defendant guilty. The judge sentenced the defendant to serve a term of from ten to twenty years in the Massachusetts Correctional Institution at Walpole. On motion by the Commonwealth, the judge then dismissed the complaint on which the defendant had been convicted in the District Court.

The defendant appealed his conviction pursuant to G.L. c. 278, §§ 33A–33G. Execution of his sentence was stayed by the Appeals Court pending this appeal. On April 4, 1977, we ordered that the matter be transferred to this court. We affirm the conviction.

The defendant raises three issues on appeal: (1) Whether the defendant was placed twice in jeopardy when he was tried on an indictment alleging the offense of which he had been earlier convicted in a District Court. (2) Whether the trial judge erred in refusing to remove a juror for bias. (3) Whether the Commonwealth presented sufficient evidence to warrant submission of the issue of a nighttime breaking and entry to a jury.

We find no error. The evidence presented at trial will be discussed as relevant to our consideration of the issues.

1. *Double jeopardy.* The defendant argues that the judge erred in denying the defendant's motion to dismiss. He contends that his indictment and trial in the Superior Court on the same factual circumstances as those which formed the basis of a previous complaint in the District Court subjected him to double jeopardy. The Commonwealth concedes that the defendant was twice tried and convicted for the same offense, but denies that this procedure constituted double jeopardy.

[1] Double jeopardy limitations on reprosecution for the same offense reflect the "deeply ingrained" principle of our jurisprudence that repeated attempts by the State to convict an individual for an alleged offense improperly subject him to "embarrassment, expense and ordeal and compel him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187–188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). The double jeopardy prohibition clearly applies to retrial after conviction as well as after acquittal.

1. A single justice of the Appeals Court on January 6, 1977, denied the defendant's motion to expand the record to include the documents relevant to the proceedings in the District Court, but permitted the defendant to append those documents to his brief for use in argument. The appropriate procedure would have been for the defendant to offer evidence of the District Court complaint in support of his motion to dismiss in the Superior Court, see *Commonwealth v. Core*, — Mass. —, — (1976) (Mass.Adv.Sh. [1976] 1387, 1390, 348 N.E.2d 777). The Commonwealth objects to our consideration of these documents, but, since our review of them does not avail the defendant, we need not reach the question of the propriety of the Appeals Court Justice's ruling.

2. General Laws c. 266, § 16, as appearing in St.1974, c. 462, § 2, provides: "Whoever, in the night time, breaks and enters a building, ship or vessel, with intent to commit a felony, or who attempts to or does break, burn, blow up or otherwise injure or destroy a safe, vault, or other depository of money, bonds or other valuables in any building or place, with intent to commit a larceny or felony, whether he succeeds or fails in the perpetration of such larceny or felony, shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one half years."

General Laws c. 266, § 16, describes an offense specifically included in the jurisdiction of the District Court. See G.L. c. 218, § 26.

See *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435, rehearing denied, 398 U.S. 914, 90 S.Ct. 1654, 26 L.Ed.2d 79 (1970); *Commonwealth v. McCan*, 277 Mass. 199, 201, 178 N.E. 633 (1931). Otherwise, a defendant would be helpless against a prosecutor who repeatedly prosecutes a defendant until a judge finally imposes a sentence satisfactory to the prosecutor. It is equally clear, however, that double jeopardy principles do not always prohibit second trials. *Thames v. Commonwealth*, 365 Mass. 477, 479, 312 N.E.2d 569 (1974).

[2, 3] It is fundamental that a defendant who claims to have been twice put in jeopardy by a trial must show that he or she had been placed in jeopardy at an earlier trial for the same offense. See *Serfass v. United States*, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975); *United States v. Sanabria*, 548 F.2d 1, 6 (1st Cir. 1976), cert. granted, 433 U.S. 907, 97 S.Ct. 2970, 53 L.Ed.2d 1090 (1977). This rationale underlies the rule that jeopardy does not attach if the earlier proceedings were conducted by a court without jurisdiction over the offense. As Chief Justice Shaw explained in *Commonwealth v. Roby*, 12 Pick. 496, 502 (1832): "[W]here the court before which the former trial took place had no jurisdiction of the offence, the party cannot be deemed in law to have been put in jeopardy, because no valid and binding judgment could have been rendered by such court." See also *Diaz v. United States*, 223 U.S. 442, 449, 32 S.Ct. 250, 56 L.Ed. 500 (1912); *United States v. Ball*, 163 U.S. 662, 669, 16 S.Ct. 1192, 41 L.Ed. 300 (1896); *Lemieux v. Robbins*, 414 F.2d 353, 354 (1st Cir. 1969), cert. denied, 397 U.S. 1017, 90 S.Ct. 1247, 25 L.Ed.2d 432 (1970). But see *Culberson v. Wainwright*, 453 F.2d 1219, 1220 (5th Cir.), cert. denied, 407 U.S. 914, 92 S.Ct. 2449, 32 L.Ed.2d 688 (1972); *Robinson v. Neil*, 366 F.Supp. 924, 928–929 (E.D.Tenn.1973).

Thus, we have held that a failure of jurisdiction due to a defendant's age nullifies the proceedings so that a subsequent trial is not barred by double jeopardy principles. *Commonwealth v. Chase*, 348 Mass. 100, 105, 202 N.E.2d 300 (1964). Similarly, where a defendant has been convicted or acquitted of a minor statutory offense in an inferior court, he may be prosecuted for a higher crime of which the inferior court lacks jurisdiction. *Commonwealth v. Mahoney*, 331 Mass. 510, 514, 120 N.E.2d 645 (1954). *Commonwealth v. Jones*, 288 Mass. 150, 152, 192 N.E. 522 (1934). *Commonwealth v. McCan*, *supra*, 277 Mass. at 204–206, 178 N.E. 633. Cf. *Commonwealth v. Clemons*, 370 Mass. —, —,[3] 346 N.E.2d 864 (1976).

[4] We conclude that the District Court had no jurisdiction over the instant offense and that, consequently, double jeopardy principles do not bar the Superior Court proceedings on the indictment charging the defendant with the commission of the same offense.[3] The District Court complaint accused the defendant of breaking and entering a dwelling house in the nighttime with the intent to commit larceny. That act is prohibited by G.L. c. 266, § 15, an offense over which the District Court lacks jurisdiction.[4] The judge properly rejected the argument that the District Court had jurisdiction and denied the defendant's motion to dismiss. It is true that a defendant may be convicted of the lesser offense of breaking and entering in the daytime even though the indictment did not allege that the act

2. Mass.Adv.Sh. (1976) 1263, 1272.

3. Thus, the defendant's reliance on *Waller v. Florida*, 398 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), is misplaced. Unlike the case here, the Municipal Court in *Waller* had jurisdiction over the offense there charged. The Supreme Court held that a State court could not convict a defendant for the same acts which were the basis of conviction "for the identical offense" tried in the inferior court. *Id.* at 395, 90 S.Ct. 1184.

4. The District Courts of the Commonwealth, pursuant to G.L. c. 218, § 26, have jurisdiction only over offenses for which the maximum authorized penalty is not more than five years' imprisonment and over crimes whose penalties may exceed five years' imprisonment but are specifically included within the District Court's jurisdiction. General Laws c. 266, § 15, satisfies neither of these jurisdictional prerequisites.

was done during the day. *Commonwealth v. Sitko*, — Mass. —, ——[b], 361 N.E.2d 1258 (1977). *Commonwealth v. Reynolds*, 122 Mass. 454, 457 (1877). Nonetheless, in those cases the court had jurisdiction over the offense whether committed during the day or night.[5] There is no evidence here that the District Court judge was acting under G.L. c. 266, § 18. We note that § 18 provides a maximum sentence of imprisonment that may be imposed in the District Court of "not more than two years," whereas the District Court judge imposed a sentence of two and one-half years in the house of correction. Cf. G.L. c. 266, § 16. The fact that the District Court judge imposed the punishment provided in § 16 rather than § 18 indicates that he was not acting in accordance with the defendant's theory.

[5] Another ground on which a double jeopardy claim might rest is that, arguably, the District Court possessed jurisdiction because the complaint referred to the defendant as having violated G.L. c. 266, § 16. Chapter 266, § 16, proscribes, inter alia, the nighttime breaking and entering of a building, ship or vessel with intent to commit a felony. It is an offense specifically included within the jurisdiction of the District Court. See G.L. c. 218, § 26. The fact that the complaint contained the phrase "in vio[lation] of G.L. c. 266, § 16" is not determinative, however, as to the offense alleged thereby. The text of the allegation determines the nature of the complaint. *Commonwealth v. McClaine*, 367 Mass. 559, 326 N.E.2d 894 (1975). Here the language in the body of the complaint alleges that the defendant committed unarmed burglary of a dwelling house in the nighttime with intent to commit a felony therein, an offense not within the scope of the District Court's powers. G.L. c. 266, § 15. Cf. G.L. c. 277, § 79.

[6] Finally, we do not agree with the defendant's contention that his case falls squarely within the prohibition described in *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). The Supreme Court in *Blackledge* specifically eschewed reliance on the double jeopardy clause. *Id.* at 31, 94 S.Ct. 2098. In *Blackledge*, a defendant who had appealed from his misdemeanor conviction in a North Carolina District Court was subsequently indicted for a felony offense involving the same transaction. The Supreme Court held that the potential for the prosecution's vindictiveness in such a situation denied the defendant due process of law. *Id.* at 27–28, 94 S.Ct. 2098. By contrast, the prosecution here did not increase the severity of the charge in retaliatory response to the defendant's exercise of his right to appeal. Instead, the government obtained an indictment for the same offense as that charged in the complaint which was erroneously brought in the District Court. The mere fact that a greater sentence was imposed in the Superior Court than in the District Court is not sufficient to involve the principle of *Blackledge*. See *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). Cf. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Martinez v. Estelle*, 527 F.2d 1330, 1332 (5th Cir.), cert. denied, 429 U.S. 924, 97 S.Ct. 325, 50 L.Ed.2d 292 (1976). We find no error in the judge's denial of the defendant's motion to dismiss.[6]

b. Mass.Adv.Sh. (1977) 668, 669–670.

5. Chapter 266, § 18, provides: "Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years."

Under this section, this court has read the daytime breaking and entering of a "building" to include the daytime breaking and entering of a "dwelling house." See, e. g., *Commonwealth v. Reynolds*, 122 Mass. 454 (1877); *Commonwealth v. Swahn*, — Mass.App. —, —, —— (1977) (Mass.App.Adv.Sh. [1977] 1091, 1096–1098, 368 N.E.2d 813).

6. The Commonwealth also argues that no double jeopardy attached since the defendant's claim of appeal for trial de novo operated to nullify the former trial. We find it unnecessary to reach that issue. The defendant's claim that an appeal from a conviction on a complaint ousts the Superior Court from any jurisdiction over the proceeding except the complaint itself also need not be reached.

2. *Juror bias.* The defendant next argues that the trial judge erred in denying the defendant's motion to remove a juror from the panel on the basis that the juror was biased. After a luncheon recess, counsel for the defendant notified the judge in a lobby conference of an incident involving Officer Waite, a prior government witness, and a woman who counsel asserted was a juror. After being summoned by the judge to the lobby conference, Officer Waite reported that "some woman" had passed him as he discussed a personal matter with Officer Shaw, also a witness for the prosecution. The woman remarked to him, "You've got good composure." Officer Waite was unable to describe or identify the woman. He was not even certain that she was a juror. The defense counsel requested that the woman be removed from the jury, but did not move for a mistrial. Nor did he request any examination of the jurors to determine whether a juror was involved.

[7] In *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), amplified in 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956), the Supreme Court stated that in a criminal proceeding, "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . [T]he burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." 347 U.S. at 229, 74 S.Ct. at 451. See also *Mattox v. United States*, 146 U.S. 140, 148–150, 13 S.Ct. 50, 36 L.Ed. 917 (1892). The Supreme Court does not state whether due process requires the application of this standard to State criminal proceedings, nor have we reached that question. We apply these standards here because we believe that improper private communications between jurors and witnesses are fundamentally inconsistent with our concepts of due process and fair trial. *Commonwealth v. Theberge*, 330 Mass. 520, 115 N.E.2d 719 (1953). Thus, we must determine whether the government sustained its burden of proving that the communication here did not prejudice the defendant.

[8] We note at the outset that it cannot be said with certainty that the communicant was a juror. For purposes of this analysis however, we shall assume that she was a member of the jury. The rule in *Remmer* applied only to communications about the matters pending before the court. The prevailing view is that mere casual conversation, unrelated to the issues of the case, held between a witness and a juror is not so improper as to constitute reversible error. E. g., *State v. Johnson*, 97 Ariz. 27, 30, 396 P.2d 392 (1964); *People v. Aguirre*, 158 Cal.App.2d 304, 309–310, 322 P.2d 478 (1958); *State v. Duguay*, 158 Me. 61, 67, 178 A.2d 129 (1962); *State v. Brown*, 84 S.D. 201, 206, 169 N.W.2d 239 (1969); Annot., 9 A.L.R.3d 1275 (1966). Compare *Commonwealth v. French*, 357 Mass. 356, 401, 259 N.E.2d 195 (1970), judgments vacated as to death penalty sub nom. *Limone v. Massachusetts*, 408 U.S. 936, 92 S.Ct. 2846, 33 L.Ed.2d 754 (1972) (accidental contact between a juror and a witness in a court house stairwell during a recess was of no consequence), with *Commonwealth v. Theberge*, *supra*, 330 Mass. at 530, 115 N.E.2d at 725 (discussion on "matters vital and essential to the material issues" in the presence of a juror requires reversal). In this case, the woman's remark in no way touched on any issues in the defendant's case. Nor did she overhear a conversation about such issues. Her comment appears innocuous.

The defendant contends, however, that the supposed juror's comment demonstrated that her allegiances were squarely on the side of the Commonwealth. We cannot agree. Although the conduct of the supposed juror here is regrettable, the nature of

her comment does not indicate that she could not give the defendant a fair trial. Cf. *Burns v. State*, 84 Conn. 513, 519, 80 A. 712 (1911) (juror's remark to witness, "I want to congratulate you on your good appearance," did not indicate bias). The judge could have determined properly that the comment was entirely neutral.

The defendant argues that at least the judge should have conducted a hearing at which the offending juror could have been questioned as to possible prejudice. We note that the defense counsel did not request a voir dire of the jury or other investigatory action. Especially in light of the uncertainty that the communicant was even a juror, the judge's inquiry of Officer Waite was sufficient to determine the nature of the incident and conclude that no prejudice occurred. Under these circumstances, the judge may have reasonably believed that interrogation of the jury would be unnecessary and perhaps counterproductive.[7] See *Commonwealth v. Curry*, 368 Mass. 195, 201–202, 330 N.E.2d 819 (1975); *United States v. Williams*, 545 F.2d 47 (8th Cir. 1976) (per curiam). Accordingly, we find the judge did not err in his handling of the juror bias problem.

3. *Directed verdict.* The defendant assigns as error the denial of the defendant's motion for a directed verdict. He argues here that the Commonwealth failed to present sufficient evidence to warrant a finding that it was the defendant who broke and entered the premises.

[9] The motion for a directed verdict presented to the judge did not raise this issue, however, as it was limited to "so much of the indictment as alleges night time break." The argument made at trial was limited to this issue. The Commonwealth argues that the defendant cannot raise for the first time at the appellate level an argument not presented to the trial judge. See *Commonwealth v. Johnson*, — Mass. —, —[c], 359 N.E.2d 1256 (1977); *Commonwealth v. Flynn*, 362 Mass. 455, 472, 287 N.E.2d 420 (1972); *Commonwealth v. Gray*, 357 Mass. 771, 772, 257 N.E.2d 924 (1970). We agree. See *Commonwealth v. Amberg*, — Mass. —, —[d], 352 N.E.2d 922 (1976).

[10] Additionally, the defendant fails to argue before this court the contention made at trial that there was insufficient evidence to warrant a finding of nighttime breaking and entering. Thus, this assignment of error brings nothing before us. S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1975). *Commonwealth v. Pisa*, — Mass. —, —[e], 363 N.E.2d 245 (1977). In these circumstances, we need not recount the evidence which would warrant the jury verdict.

We have, however, reviewed the entire record to ascertain whether either argument has any merit so as to avoid any "substantial risk of a miscarriage of justice." *Commonwealth v. Freeman*, 352 Mass. 556, 564, 227 N.E.2d 3, 9 (1967). We conclude there is no merit to the defendant's arguments and that there is no such substantial risk in this case. *Commonwealth v. Leavy*, 369 Mass. —[f], 339 N.E.2d 923 (1976).

Judgment affirmed.

7. There may be situations, however, where a claim of improper communication between a juror and third persons would require examination of the juror. See *Commonwealth v. Theberge*, 330 Mass. 520, 527–530, 115 N.E.2d 719 (1953).

c. Mass.Adv.Sh. (1977) 247, 253.

d. Mass.Adv.Sh. (1976) 2125, 2133.

e. Mass.Adv.Sh. (1977) 1033, 1037.

f. Mass.Adv.Sh. (1976) 1.